

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**OIL CAPITOL SHEET METAL, INC.**

**and**

**Case 17-CA-019714**

**SHEET METAL WORKERS' INTERNATIONAL  
ASSOCIATION, LOCAL 270, AFL-CIO**

**ORDER**

The Charging Party's Request for Review of the General Counsel's decision affirming the Regional Director's compliance determination is denied. In the underlying unfair labor practice proceeding, the Board found, *inter alia*, that the Respondent violated Section 8(a)(3) and (1) by refusing to hire discriminatee Mike Couch and refusing to consider him for hire.<sup>1</sup> In the compliance determination at issue here, the Regional Director found that Couch is entitled to backpay for a period of 7.2 weeks and he is not entitled to reinstatement.

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<sup>1</sup> 349 NLRB 1348 (2007), *pet. for review dismissed* 561 F.3d 497 (D.C. Cir. 2009). In *Oil Capitol*, the Board held that “the traditional presumption that [a discriminatee’s] backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement” no longer applies where the discriminatee is a union salt. 349 NLRB at 1349. The Board accordingly held that it would “now require the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel’s compliance specification.” *Id.* The Board also held that an reinstatement or reinstatement order for a salt/discriminatee would be subject to defeasance if, at the compliance stage, the General Counsel “fails to prove by affirmative evidence the reasonableness of a claim that the backpay period should run indefinitely . . . .” *Id.* Chairman Liebman dissented in part from the Board’s decision.

We decline the Charging Party's invitation to reconsider the prior decision in this case.

The Charging Party argues, inter alia, that (1) the Regional Director erred by limiting the backpay period to 7.2 weeks and denying instatement, because the Charging Party presented sufficient evidence of Couch's intent to remain employed by the Respondent indefinitely, or at least until he ceased his search for interim employment on November 1, 2005; and (2) the Regional Director erred in using only the average hours of several journeyman sheet metal employees to calculate Couch's backpay, because Couch was willing to work in any available position and, therefore, comparable employees also include employees who worked in the Respondent's shop and trailer divisions and employees who worked as apprentices or leads.

We find no merit in the Charging Party's arguments. We find that the Region did not clearly err by limiting the backpay period to 7.2 weeks or by finding that Couch is not entitled to instatement. The Regional Director demonstrated that the Respondent's workforce was reduced following the completion of its construction of Columbia Crest Hospital, and he reasonably concluded that Couch would not have remained employed after the project ended. The Charging Party has not provided evidence sufficient to establish that this conclusion was in error.

Further, the Charging Party failed to show that the Regional Director erred in calculating Couch's backpay based on the hours of journeyman sheet metal employees. Relying on "[t]he hours and/or earnings of comparable employees" is an accepted method of calculating backpay. See Casehandling Manual (Compliance) Sections 10540.1, 10540.3. The Regional Director provided a detailed explanation for his finding that Couch would not have been hired for any position other than that of a journeyman sheet metal employee, and the Charging Party has not adduced specific evidence to

contradict this finding. Under the circumstances, the Charging Party has failed to establish that the Region erred in selecting journeyman sheet metal employees as comparable employees.

Accordingly, we conclude that the Charging Party has failed to establish a sufficient basis for reversing the Regional Director's compliance determination.

Dated, Washington, D.C., July 22, 2010

WILMA B. LIEBMAN,	CHAIRMAN
PETER C. SCHAUMBER,	MEMBER
CRAIG BECKER,	MEMBER